Yap Kok Foong & Anor v Colgate Palmolive (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTIONS NO R2-25-92 OF 1998 AND NO R2-25-93 OF 1998
FAIZA TAMBY CHIK J
12 APRIL 2000

***Labour Law** — Employment — Retirement — Retirement age — No contractual stipulation pertaining to retirement age — Test to determine retirement age — Extension of applicant's services after purported retirement age, whether relevant —Failure to call person who had decided to dismiss applicants — Reasonable expectation of applicants as to when they should retire — How to determine normal retirement age of employees in applicants' category*

The applicants were forcibly retired by the first respondent upon attaining the age of 55 years. There was no express stipulation in the applicants' contract of employment that provided for retirement age. The applicants made representation to the Industrial Relations Department that they had been dismissed without just cause or excuse. They contended that the retirement at the age of 55 was premature and the retirement age should be 60. The first respondent contended that it was its policy to retire employees upon their attaining the age of 55. The matter was referred to the Industrial Court whereby the Industrial Court found that the applicants' retirement which constituted a termination of their services did not amount to a dismissal without just cause or excuse. In arriving at the conclusion, the Industrial Court took into consideration the following: (i) the normal retirement age of 55 set out in the collective agreements; (ii) the stipulation of the retirement age of 55 in the Human Resources Department Personnel Procedures and Guidelines ('HRDPPG'); (iii) the first respondent's purported extension of the applicants' service after they had attained 55 years of age; and (iv) exh R-1 of the first respondent's affidavit in reply pertaining to the loan facility. The applicants applied for orders of certiorari and mandamus to quash the award of the Industrial Court on the ground that the Industrial Court had reached absurd results in handing down the impugned award and thus the decision suffered from infirmity on the grounds of illegality, irrationality, perversity and was a nullity.

Held, allowing the application:

(1) In the absence of a contractually agreed stipulation in relation to retirement age being 55, the applicants were entitled to work up to the normal retirement age of employees in their category, which age was to be determined by the Industrial Court. The Industrial Court had committed a jurisdictional error of law and the impugned award suffered from infirmity on the ground of illegality and irrationality as it failed to determine the crux of the issue before it namely, what was the normal retirement age of

employees in the applicants' category, but instead purportedly decided the normal retirement age of employees in the first respondent generally (see p 339G–I).

(2) The absence of a retirement clause in the applicants' employment did not mean that the first respondent can never bring the applicants' services to an end or that the applicants have a right to a life-long employment. Due to this lacuna, the applicants were entitled to work up to the normal retirement age of the employees in their category and the normal retirement age in the circumstances of the case was 60 and not 55 (see p 330D).

(3) The conclusion arrived at by the Industrial Court was in total contradiction with its findings of facts that the collective agreements and the HRDPPG were inapplicable to both the applicants. It was much in evidence that the impugned award was perverse as not only was the final conclusion of the Industrial Court diametrically contrary to the evidence on record and findings, but also the final conclusion was also such that no reasonable person would have arrived at. There appears to be no basis upon which the Industrial Court arrived at its conclusion that the normal retirement age was 55. The impugned award suffered from irrationality and perversity (see pp 334F, H–I, 336A–B).

(4) The fact that the first respondent extended the applicants' services after they had attained 55 did not in any manner prove that the normal retirement age of employees in the applicants' category was in fact and in reality at the age of 55. It was evident from the applicants' uncontroverted testimony during the hearing before the Industrial Court that the applicants had protested against the purported extension of service and thus that at no time agreed to the variation vide the purported extension (see p 336E–F).

(5) The Industrial Court did not call its Human Resource Director as a witness. It is a principle of industrial law that the person who decided to dismiss the applicants must be called as a witness. The failure to call him meant that the applicants could not cross-examine him about the retirement process in the company and why he decided to retire the applicants at 55. The Industrial Court failed to address this issue in the award (see p 337D).

(6) The loan documents did not in any manner prove the normal retirement age of the first respondent of employees in the applicants' category. In fact, this loan document ought not to have been considered in the first place (see p 341A–B).

(7) The applicants' contention that they had a reasonable expectation to retire at 60 as there was no stipulation as to their retirement age in their contracts of employment was in fact fully placed and argued before the Industrial Court. As such, even if

the aforesaid was not specifically pleaded, since it was fully argued and submitted on before the Industrial Court without any objection, it was too late in the day for the first respondent to contend that this issue cannot be relied on by the applicants (see p 345C–D). A

(8) Based on the findings of fact of the Industrial Court and the evidence adduced before it, the first respondent had failed to prove on a balance of probability that 55 was the normal retirement age of employees in the same category as the applicants and in the alternative failed to disprove that the applicants' normal retirement age was 60. As such, the inevitable conclusion was that the applicants' termination by way of retirement upon attaining 55 was without just cause or excuse (see pp 348I–349B). B C

(9) In the light of the fact that the Industrial Court had failed to take into consideration its earlier findings of fact, the impugned award was erroneous in its entirety. The purported reasons in which the Industrial Court had relied on was in fact irrelevant and inapplicable to the applicants in the circumstances of the case. Thus it was clear that the Industrial Court had failed to provide sufficient and adequate reasons in arriving at the decision that the dismissal was with just cause or excuse (see p 350E–F). D

E

[Bahasa Malaysia summary

Pemohon-pemohon telah dipaksa bersara oleh penentang pertama apabila mencapai umur 55 tahun. Tiada penetapan nyata dalam kontrak penggajian pemohon-pemohon yang memperuntukkan umur persaraan. Pemohon-pemohon telah membuat representasi kepada Jabatan Perhubungan Perindustrian bahawa mereka telah dipecat tanpa sebab atau alasan yang munasabah. Mereka berhujah bahawa persaraan pada umur 55 tahun adalah pra-masa dan umur persaraan sepatutnya 60. Penentang pertama berhujah bahawa adalah merupakan polisi mereka untuk menyara pekerja-pekerja apabila mereka mencapai umur 55. Perkara ini telah dirujuk kepada Mahkamah Perusahaan yang mana Mahkamah Perusahaan mendapati bahawa persaraan pemohon-pemohon yang membentuk pemberhentian perkhidmatan mereka tidak berjumlah kepada suatu pemecatan tanpa sebab atau alasan yang munasabah. Dalam mencapai kesimpulan ini, Mahkamah Perusahaan telah mengambil kira hal-hal berikut: (i) umur persaraan biasa pada 55 tahun yang dinyatakan dalam perjanjian kolektif; (ii) penetapan umur persaraan pada 55 tahun dalam Prosedur dan Garis Panduan Kakitangan Jabatan Sumber Manusia (PGPKJSM); (iii) perlanjutan perkhidmatan pemohon-pemohon oleh penentang pertama setelah mereka mencapai 55 tahun; dan (iv) eksh R-1 afidavit jawapan penentang pertama yang berhubung dengan kemudahan pinjaman. Pemohon-pemohon memohon perintah certiorari dan mandamus F G H I

A bagi membatalkan award Mahkamah Perusahaan atas alasan bahawa Mahkamah Perusahaan telah mencapai keputusan yang mustahil dalam memberikan award yang dipersoalkan dan justeru itu, keputusan tersebut dicemari kecacatan berlandaskan alasan-alasan kepenyalahan, ketidakwarasan dan kesalahan dan merupakan suatu pembatalan.

B

Diputuskan, membenarkan permohonan tersebut:

(1) Dalam ketiadaan sebarang penetapan yang telah dipersetujui secara kontraktual berkenaan dengan umur persaraan pada 55 tahun, pemohon-pemohon berhak bekerja sehingga umur persaraan biasa untuk pekerja-pekerja dalam kategori mereka, yang mana akan ditentukan oleh Mahkamah Perusahaan. Mahkamah Perusahaan telah melakukan suatu kesilapan bidang kuasa undang-undang dan award yang dipersoalkan dicemari kecacatan atas alasan kepenyalahan dan ketidakwarasan kerana ia gagal menentukan perkara utama isu di hadapannya, iaitu apakah umur persaraan biasa untuk pekerja-pekerja dalam kategori pemohon-pemohon, tetapi sebaliknya telah memutuskan umur persaraan biasa pekerja-pekerja dalam syarikat penentang pertama secara am (lihat ms 339G–I). C D

(2) Ketiadaan suatu fasal persaraan dalam penggajian pemohon-pemohon tidak bermakna bahawa penentang pertama tidak boleh menamatkan perkhidmatan pemohon-pemohon atau bahawa pemohon-pemohon berhak bekerja sepanjang hayat. Disebabkan lacuna ini, pemohon-pemohon berhak bekerja sehingga umur persaraan biasa untuk pekerja-pekerja dalam kategori mereka dan umur persaraan yang biasa dalam keadaan kes ini adalah 60 dan bukannya 55 (lihat ms 330D). E F

(3) Kesimpulan yang dicapai oleh Mahkamah Perusahaan adalah bertentangan dengan keputusan fakta yang dibuat bahawa perjanjian kolektif dan PGPKJSM tidak terpakai kepada kedua-dua pemohon. Amat nyata bahawa award yang dipersoalkan adalah salah kerana kesimpulan muktamad Mahkamah Perusahaan bukan sahaja betul-betul bertentangan dengan keterangan pada rekod tetapi sifat kesimpulan muktamad sedemikian hinggakan tidak mungkin orang yang munasabah akan mencapainya. Tiada kelihatan dasar pada mana Mahkamah Perusahaan mencapai kesimpulannya bahawa umur persaraan biasa adalah 55 tahun. Award yang dipersoalkan dicemari kecacatan dan kesalahan (lihat ms 334F, H–I, 336E–F). G H

(4) Hakikat bahawa penentang melanjutkan perkhidmatan pemohon-pemohon setelah mereka mencapai umur 55 tahun tidak dalam apa-apa cara membuktikan bahawa umur persaraan biasa pekerja-pekerja dalam kategori pemohon-pemohon sebenarnya dan memang pada umur 55 tahun. Adalah nyata daripada keterangan pemohon-pemohon yang tidak dicabar I

semasa perbicaraan di hadapan Mahkamah Perusahaan bahawa pemohon-pemohon telah membantah perlanjutan yang dikatakan dan justeru itu telah tidak pada mana-mana masa bersetuju kepada pengubahsuaian tersebut melalui perlanjutan yang dikatakan (lihat ms 336E–F). A

(5) Mahkamah Perusahaann tidak memanggil Pengarah Sumber Manusianya sebagai seorang saksi. Adalah satu prinsip undang-undang perusahaan bahawa orang yang membuat keputusan untuk memecat pemohon-pemohon mestilah dipanggil sebagai seorang saksi. Kegagalan untuk memanggil beliau bermakna bahawa pemohon-pemohon tidak boleh memeriksa balasnya mengenai proses persaraan dalam syarikat tersebut dan mengapakah beliau bercadang untuk menyara pemohon-pemohon pada umur 55 tahun. Mahkamah Perusahaan gagal menyelesai isu ini dalam awardnya (lihat ms 337D). B C

(6) Dokumen-dokumen pinjaman tidak dalam apa-apa cara membuktikan umur persaraan biasa oleh penentang pertama untuk pekerja-pekerja dalam kategori pemohon-pemohon. Sebenarnya dokumen pinjaman ini tidak seharusnya dipertimbangkan sama sekali (lihat ms 341A–B). D

(7) Penghujahan pemohon-pemohon bahawa mereka mempunyai jangkaan yang munasabah untuk bersara pada umur 60 oleh kerana tiada penetapan mengenai umur persaraan mereka dalam kontrak penggajian mereka sebenarnya telah dirumuskan dan dihujahkan sepenuhnya di hadapan Mahkamah Perusahaan. Oleh yang demikian, jika pun perkara tersebut tidak diplidkan secara spesifik, oleh kerana ia telah dihujahkan sepenuhnya di hadapan Mahkamah Perusahaan tanpa apa-apa bantahan, kini adalah terlalu lambat untuk penentang pertama berhujah bahawa isu ini tidak boleh diharapkan oleh pemohon-pemohon (lihat ms 345C–D). E F

(8) Berlandaskan keputusan fakta Mahkamah Perusahaan dan keterangan yang dikemukakan di hadapannya, penentang pertama telah gagal membuktikan atas imbangan kebarangkalian bahawa 55 merupakan umur persaraan biasa untuk pekerja-pekerja dalam kategori yang sama dengan pemohon-pemohon dan secara alternatif gagal membuktikan kesilapan bahawa umur persaraan biasa untuk pemohon-pemohon adalah 60. Dengan itu, kesimpulan yang tidak boleh dielakkan adalah bahawa pemecatan pemohon-pemohon melalui persaraan setelah mencapai umur 55 tahun adalah tanpa seb ab atau alasan yang munasabah (lihat ms 348I–349B). G H

(9) Memandangkan hakikat bahawa Mahkamah Perusahaan telah gagal mengambil kira keputusan fakta yang dibuatnya lebih awal, award yang dipersoalkan adalah terkhilaf secara keseluruhan. Alasan-alasan yang dikatakan telah digunakan oleh Mahkamah Perusahaan sebenarnya tidak relevan dan tidak boleh dipakai I

terhadap pemohon-pemohon dalam keadaan kes. Justeru itu adalah nyata bahawa Mahkamah Perusahaan telah gagal memberi alasan yang memadai dan mencukupi dalam mencapai keputusan bahawa pemecatan tersebut adalah dengan sebab atau alasan yang munasabah (lihat ms 350E–F).]

Notes

For a case on retirement, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) para 850.

Cases referred to

Bharat Bank Ltd Dehli, The v The Employees of Bharat Bank Ltd Dehli and The Bharat Bank Employees' Union Dehli AIR 1950 SC 188 (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)

Cygal Bhd v Issam Abdul Rahman [1998] 3 ILR 44 (refd)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)

Goon Kwee Phoy v J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129 (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)

Innoprise Corp Sdn Bhd Sabah v Sukumaran Venugopal [1993] 1 ILR 373 (refd)

KSP Mohamed Ali v KEP Mohamad Ismail [1981] 2 MLJ 10 (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (refd)

Lever Bros Ltd v Bell [1931] 1 KB 557 (refd)

M/s Saudi Arabian Airlines v Mrs Shehnaz Mudbhatkal & Anor (1999) 81 FLR 767 (refd)

Malakoff Bhd v Kuppusamy & Ors [1991] 1 MLJ 39 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)

National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Rothas Industries Ltd v Brijnandan Pandev & Ors Air 1957 SC 1 (refd)

Shapadu Energy & Engineering Sdn Bhd v Stuart Ashley Eban (Originating Motion No R2–25–112–98 — unreported) (refd)

Sports Toto Malaysia Sdn Bhd v Wong Yat Sing [1995] 1 ILR 747 (refd)

Swedish Motor Assemblies Sdn Bhd v Hj Md Ison bin Baba [1998] 2 MLJ 372 (refd)

Union of Construction, Allied Trades and Technicians v Brain [1981] ICR 542 (refd)

Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor [1991] 2 MLJ 115 (refd)

Waite v Government Communications Headquarters [1983] ICR 653 (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20(1), (3), 30(5)

P Thavaselvi (*P Kuppusamy*) for the applicants.
Steven Thiruneelakandan (*Shook Lin & Bok*) for the respondents.

Faiza Tamby Chik J: This is an application for Usul Pemula No R3–25–92–98 for orders of certiorari and mandamus (encl 7) in respect of Industrial Court Award No 368 of 1998 handed down on 23 July 1998. The salient facts of the case are as follows: The applicant commenced employment with the company ('the first respondent') on 23 April 1963 as a general labourer. On 15 June 1981, the applicant was promoted as production shift manager. On 15 January 1993, the applicant was promoted as senior shift manager. At the time of his dismissal, the applicant was the senior shift manager and his remuneration package was as follows:

(a)	Salary	RM3,938
(b)	Shift Allowance	RM 100
(c)	Laundry Allowance	RM 10

It is noted that at all material times, there was no express stipulation in the applicant's contract of employment that provided for retirement age.

By a letter dated 27 April 1995 (see exh 'YKF-2' at p 14 of encl 3), the first respondent informed the applicant that he had attained the retirement age of 55 on 23 March 1995, but his services were being extended to 30 June 1996. Despite the fact that there was no express stipulation as to the retirement age provided for in the applicant's contract of employment, through a letter dated 22 January 1996 (see exh 'YKF-3' at pp 16–17 of encl 3) the first respondent forcibly retired the applicant with effect from 30 June 1996. The applicant made representations to the Industrial Relations Department that he had been dismissed without just cause or excuse. As the Director General of Industrial Relations could not resolve the dispute, the Honourable Minister of Human Resources referred the matter to the Industrial Court for an award. The reference was registered as Industrial Court No 8/4–237/97. The Industrial Court ('the second respondent') heard the reference together with Case No 8/4–188/97 (Usul Pemula No R3–25–93–98) and handed down Award No 368 in which it found that the applicant's retirement which constituted a termination of his services did not amount to a dismissal without just cause or excuse.

It is this award that is now being impugned (see exh 'YKF-9' which is at pp 233–266 of encl 3).

Simultaneously an application of Usul Pemula No R3–25–93–98 is also made together with this application for similar orders of certiorari and mandamus (encl 7) in respect of Industrial Court Award No 369 of 1998 handed down on 23 July 1998. The salient facts in this case are as follows: The applicant commenced employment with first respondent on 9 April 1962 as a senior operator, Class I. On 1 May 1969, the applicant was promoted to the position of detergent making shift supervisor. At the time of his dismissal, the applicant was the continuous improvement supervisor and his last drawn salary was RM5,455. At all material times, there was no stipulation in the applicant's contract of employment that provides for retirement at the age of 55.

By a letter dated 27 April 1995 (see exh 'CKF-2' at p 14 of encl 3), the first respondent informed the applicant that he would attain retirement age of 55 on 21 September 1995, but that his services were being extended to 30 June 1996. Despite the fact that there is no express stipulation as to retirement age provided for in the applicant's contract of employment, through a letter dated 22 January 1996 (see exh 'CKF-3' at pp 16–17 of encl 3), the first respondent forcibly retired the applicant with effect from 30 June 1996. Through a letter dated 6 June 1996 (see exh 'CFK-4' at p 18 of encl 3), the applicant inquired from the company for reasons as to his premature retirement at the age of 55 instead of at the age of 60. By a letter dated 10 June 1996 (see exh 'CKF-5' at p 19 of encl 3) the first respondent replied by stating that it is its policy to retire employees upon their attaining the age of 55. The applicant made representations to the Industrial Relations Department that he had been dismissed without just cause or excuse. As the Director General of Industrial Relations was unable to resolve the dispute, the Honourable Minister of Human Resources referred the matter to the Industrial Court for an award. The reference was registered as Industrial Court Case No 8/4–188/97. The Industrial Court ('the second respondent') heard the reference together with Industrial Court Case No 8/4–237/97 (Usul Pemula No R3–25–92–1998) and handed down Award No 369 of 1998 in which it found that the applicant's retirement which constituted a termination of his services did not constitute a dismissal without just cause or excuse.

It is however, pertinent to note that as both the cases were heard together before the second respondent, and the reasons for the instant case are also set out in Award No 368 of 1998, as is evident at p 3 of the award (see exh 'CKF-11' at p 236 of encl 3):

> … this case was jointly heard with the Industrial Court Case No 237/97 pursuant to which court handed down its decision for the latter case vide Award No 368 of 1998.
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> For the above reasons set out in Award No 368 of 1998 and taking into account the evidence peculiar to the claimant's case the court holds …

It is both these awards that is now being impugned (see exh 'CKF-11' at pp 234–238 and exh 'CKF-12' at pp 237–272 of encl 3). For purposes of easy reference, I refer to Award No 368 of 1998 as 'the Principal Award' and Award No 369 of 1998 as 'the Secondary Award'.

In a reference under s 20(3) of the Industrial Relations Act 1967 ('the Act') the duty of the Industrial Court is first to identify the employer's reason for the dismissal after which it must decide whether the dismissal was with just cause or excuse. This proposition of law is found in the decision of the Federal Court in *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129 wherein Raja Azlan Shah CJ (Malaya) stated at p 136:

> Under the Industrial Relations Act 1967 what the employee can do in the case of a unilateral termination is to apply under s 20(1) of the Act. This section which reads:
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> > 'Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within thirty days of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.'
>
> is, in our view deliberately, couched in subjective terms. Where a non-union workman considers that his dismissal is without just cause or excuse, he may make representations for his reinstatement. It is not whether he had been dismissed without just cause or excuse: but it is how he considers he has been treated by his employer that constitutes the test for his action.
>
> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

In the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 Eusoff Chin CJ at p 176 said:

> What are the functions of the Industrial Court? We need only refer to three authorities.
>
> In *Goon Kwee Phoy & Ors v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136, Raja Azlan Shah CJM (as he then was) held:
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> > '... Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse.'
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> The same learned judge held in *Hotel Malaya Sdn Bhd & Anor v National Union of Hotel Bar and Restaurant Workers & Anor* [1982] 2 MLJ 237 at p 240:
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> > '... Its functions comprise an investigation of the facts, and lastly the application of the law to those findings.'

A In *L Michael & Anor v M/s Johnson Pumps India Ltd* [1975] 1 LLJ 262 at p 268, the Supreme Court of India held:

> 'The tribunal has the power and, indeed the duty to X-ray the [termination] order and discover its true nature, if the object and effect, if the attendant circumstances and the ulterior purpose to dismiss the employee because he is an evil to be eliminated. But if the management, B to cover up the inability to establish by an enquiry, illegitimately but ingeniously passes an innocent-looking order of termination simpliciter, such action is bad and is liable to be set aside.'

It is pertinent to note that the Industrial Court is enjoined by s 30(5) of the Act to act accordingly to equity, good conscience and the substantial merits C of the case without regard to technicalities and legal form. Bearing in mind the exhortation contained in s 30(5) of the Act, the approach to be taken in considering any claim for unfair dismissal should be as has been succinctly laid down by the English Court of Appeal in *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 where Donaldson LJ at pp 549–550 said: D

> … In considering any claim for unfair dismissal, the starting point is always s 57(3) of the Employment Protection (Consolidation) Act 1978. Usually it is the only relevant law for it is a simple and comprehensive provision. This is as it should be, because these claims which must, by their very nature, be disposed of simply and quickly, without reference to legalistic refinements.
>
> E The section operates in three stages. First, the employer has to show *why in fact* he dismissed the employee. I say 'why in fact' because the Act does not concern itself with possible justifications which occur to the employer later or which did not move him at the time. This is no great burden upon the employer. He must, after all, know why he dismissed the employee.
>
> Next the employer has to show that this reason falls into one of the four F categories of reasons set out in sub-s (2) of s 57 or that it was 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held': see sub-s (1)(b). This is not an exercise in elaborate legal classification. All that is required is that the tribunal shall consider whether looking at the matter broadly and giving the words their ordinary meaning, the reason for the dismissal falls within one or G other of these five descriptions.
>
> The third stage consists of the tribunal asking itself the question, 'Has the employer satisfied us that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating this conduct as a sufficient reason for dismissing the employee': see sub-s (3). Whether someone acted reasonably is always a pure question of fact, so long as the H tribunal deciding the issue correctly directs itself on the matters which should and should not be taken into account. But where Parliament has directed a tribunal to have regard to equity — and that, of course, means common fairness and not a particular branch of the law — and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it I in an employment and industrial relations context and not in the context of the Temple and Chancery Lane. It should, therefore, be very rare for any decision of an industrial tribunal under this section to give rise to any question of law. And this is quite plainly what Parliament intended.

Thus in these instant cases, the second respondent had to firstly determine whether the applicants were dismissed and if so, whether the said dismissals were with or without just cause or excuse. As far as the former issue is concerned in Usul Pemula No R3–25–92–98 the chairman of the second respondent held at pp 19–34 of the award (see pp 251–266, respectively of encl 3) as follows: A B

> ... Retirement likewise is also a dismissal for the purpose of industrial adjudication under s 20 of the Act.
>
> The court accordingly holds that the claimant's retirement which constituted a termination of his service ...

In the case of Usul Pemula No R3–25–93–98 the chairman of the second respondent held also the same (see pp257–272 respectively of encl 3). Hence the only issue in both the usul pemula that was left to be determined by the second respondent in the circumstances of these instant cases was whether the applicants' dismissal was with or without just cause or excuse. The reason for the dismissal of both the applicants can be found in the pleadings (see exhs 'YKF-5' and 'CKF-7' at p 34 of encl 3). It reads as follows: C D

> The reference to 55 as the retirement age at certain points of the history of the relationship between the company and its employees when employment matters were dealt with as reflected in the successive collective agreements and the company's HRDPPG is indicative of 55 being the normal retirement age of the company. Together with the earlier stated matters, the company's actions at certain defining moments of the claimant's career, inter alia, his promotion to a managerial position and the extension of his service when he attained the age of 55 compels the court to the view that the claimant had no reasonable basis for contending that he had the reasonable expectation to retire at the age of 60. E F

Therefore, the fundamental duty on the second respondent in the instant cases was to enquire whether the reason advanced by the first respondent which was in accordance with its established practice and policy on retirement age, which was always an express/implied term of the contract of service of the claimant that he would retire upon reaching the retirement age of 55 for terminating the applicants' services had in fact been proven by the first respondent. G

A correct statement of the current law relating to judicial review may be found in the decision of the Federal Court in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor*. There Edgar Joseph Jr FCJ relying on the decision of his Lordship Lord Diplock in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, adopted three grounds under which a decision is amenable to judicial review. At p 187 he said: H

> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it: I

> 'By "illegality" as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (see *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "*procedural impropriety*" rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.'

In the case of *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 the meaning of 'unreasonableness' was stated by the Supreme Court at p 422:

> The third ground is nothing more than a repetition of the second ground but in relation to all five charges and worded so as to include all the incidents of the doctrine of ultra vires, ie cases of excess or lack of jurisdiction and unreasonableness in the broad sense as expounded by Lord Greene in *Wednesbury Corp*, to give the appearance of a formidable ground. What it really amounts to is that in arriving at its conclusion and decision on the five charges the Industrial Court acted in excess of its jurisdiction or in other words *ultra vires* and therefore a nullity. Lord Reid's speech in *Anisminic v Foreign Compensation Commission* at p 171 is relevant:
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> > 'It has sometimes been said that it is only *where a tribunal acts without jurisdiction that its decision is a nullity*. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a

> decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. *It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.*' (Emphasis added.)

So is Lord Green MR's speech in the *Wednesbury Corp*'s case at p 229, explaining the meaning of 'unreasonableness' in its broad or comprehensive sense:

> I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty — these of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.
>
> It is true the discretion must be experienced reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. *For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.* If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. (Emphasis added.)

From the above authorities, it is clear that an application for certiorari may succeed if the impugned decision suffers from any of the following infirmities:

(a) Illegality — that the decision-maker had failed to keep strictly within the perimeters of its powers;

(b) Irrationality or '*Wednesbury* unreasonableness' — that the decision was 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'; and

(c) Procedural impropriety — that the decision-maker failed to observe basic rules of natural justice and/or procedural rules.

The law now is settled that when a decision is challenged on the grounds of '*Wednesbury* unreasonableness', the High Court is not confined to merely examining the decision making process, it is now empowered to examine the merits of the decision itself. It was so held by the Supreme Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 wherein Gopal Sri Ram JCA stated as follows at pp 1020–1021:

> A Until very recently, it was generally thought that when a decision is challenged on grounds of '*Wednesbury* unreasonableness', the court is confined to an examination of the decision-making process and not the merits of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analysing later judicial pronouncements that had addressed the subject. The fallacy of the doctrine that judicial review is *always* confined to the decision-making process and *never* with the merits of the decision itself B was exploded by the landmark decision of this court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.
>
> Edgar Joseph Jr FCJ, who formed the majority, explained the true principle in language that merits recollection (at pp 186–187):
>
> > 'It is often said that judicial review is concerned not with the decision but C the decision-making process (see eg *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service* D *Unions v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of *procedural impropriety.*
> >
> > But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such E decisions not only for process, but also for substance.'

In the Court of Appeal case of *Swedish Motor Assemblies Sdn Bhd v Hj Md Ison bin Baba* [1998] 2 MLJ 372, Gopal Sri Ram JCA again said (at p 380):

> But, as Wade and Forsyth, *Administrative Law* (7th Ed, 1994) have correctly pointed out (at p 312):
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> F
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> > ' "No evidence" does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at pp 760–763; *Lee v The Showmen's Guild of Great Britain* [1952] QB 329 at p 345), or where, G in other words, no tribunal could reasonably reach that conclusion on that evidence. (see *R v Roberts* [1908] 1 KB 407 at p 423). This "no evidence" principle clearly has something in common with the principle that perverse or unreasonable action is unauthorized and *ultra vires.*'
>
> As I have said, our conclusion that the employee had been dismissed from service without just cause or excuse was arrived at as a result of reviewing the H award not only for process but also for substance and, in my view, came within the range of the two exceptions aforesaid.

Therefore in these two instant cases it is incumbent for the court to review not only for process but also for substance.

The grounds on which the impugned award are being challenged are I found in encl 7 (see pp 2 and 4 of encl 7). The main ground of these applications may be summarized as the second respondent had reached absurd results or reached results absurdly in handing down the impugned award and thus the said decision suffers from infirmity on the grounds of illegality, irrationality, perversity and is a nullity. In the instant cases there was no express stipulation in their contract of employment and the company's act of forcibly retiring both the applicants with effect from 30 June 1996, based on a retirement age policy was tantamount to the imposition of a new term and was thus, a unilateral variation of his contract of service (see p 26 of encl 3 and exhs 'CKF-2' and 'CKF-5' at p 19 of encl 3). Therefore I am of the opinion that the first respondent had wrongfully terminated the applicants' contracts of employment when it sought to retire both the applicants at the age of 55 and as such, the applicants' termination of services was without just cause and excuse. The chairman of the second respondent in dealing with the reason advanced by the first respondent held, inter alia, as follows at pp 7–8 of the award (see pp 239–240 and pp 245–246 of encl 3):

> Terms as to retirement age introduced through HRDPPG.
>
> In 1983, the company did issue its Human Resources Department Personnel Procedures and Guidelines ('HRDPPG') document which applied generally, ie to both unionized and management staff. Male employees are required to retire at the age of 55. In the circumstances of this case, the court does not think that the stipulation of the retirement age issued 10 years after the claimant's appointment makes that stipulation an express term of the contract of employment binding upon the claimant.
>
> Granted that the claimant had agreed to be bound by such of the company's personnel policies in force at the date of his appointment or any changes thereto, the court does not think that this gives the company the power to introduce new contractual terms and conditions of employment or vary the same through its personnel policies. Any of such policies purporting to have the effect of a term of the contract of employment subsisting between the parties would tantamount to a variation of contract which would according to the principles of contract law required the assent of the claimant. Such unilaterally imposed terms cannot be enforced as a matter of law.

Later at pp 10–11 of the award the chairman held thus (please see pp 242–243 and pp 248–249 of encl 3).

> Learned counsel for the claimant contended that the primary point to consider is whether there was a retirement age of 55 imposed on the claimant when he first joined the company. There was no such condition of employment then. He went on to submit that although the claimant did initially come under the collective agreement as he was a bargainable employee, at the time of his dismissal he was not so covered as he was holding a management level position. As the claimant was no longer covered by the benefits given under the collective agreement, it cannot be argued that he was covered by the provision relating to retirement. The company cannot choose that just one term relating to retirement to be incorporated into the claimant's contract of service, while leaving out the remaining terms under the collective agreement.
>
> The court agrees with the submission made on behalf of the claimant above. The court holds that the normal retirement age of 55 set out in the collective agreement did not apply to the claimant in his capacity as a management level staff.

A It is noted in the Usul Pemula No R3–25–93–98, it was further confirmed in the secondary award wherein the chairman of the second respondent held at pp 3–4 of the Secondary Award as follows (see pp 236–237 of encl 3):

> For the reasons set out in Award No 368 of 1998 and taking into account the evidence peculiar to the claimant's case, the court holds that there is neither B express nor implied terms stipulating that the claimant's retirement age is 55. The court also holds that there is no implied term that the retirement age is 60.

It is observed that in relation to the reason advanced by the first respondent for terminating both the applicants, the second respondent made a finding of fact that it was never an express term of the applicant's contract of service C that he would retire upon attaining the age of 55. The chairman of the second respondent further found that any attempt by the first respondent introducing new contractual terms and conditions of employment of the applicants or to vary the same would tantamount to a variation of contract and such unilaterally imposed terms cannot be enforced as a matter of law. In relation to the first respondent's contention in respect of the purported D implied term that 55 was the operative retirement age of the applicants; contract of services, the chairman of the second respondent stated at p 18 of the award (see p 250 of encl 3) as follows:

> The court finds that the recourse to the device of the implied term is an unhelpful and inappropriate way of dealing with the issue of retirement age E raised in this case. There is an air of unreality in the attempts to persuade the court to imply terms which, it is said, must have been intended by the parties to form part of the contract at the time of its formation by reference to the stipulations as to retirement age in collective agreements and Human Resource Department Personnel Policies and Guidelines which came into existence subsequent to the formation of the contract.

F Therefore, based on the aforesaid findings of the chairman of the second respondent it is clear that the second respondent has found as a fact that there was no provision whatsoever, whether implied or express, in the applicants' contracts of employment stipulating that they were to retire upon attaining 55 or 60 years of age. It is noted in the Usul Pemula No R3–25–93–98 the chairman of the second respondent then correctly identified G the issue before it when he stated at p 4 of the secondary award (see p 237 of encl 3) as follows:

> In the absence of either an express or an implied term stipulating the claimants' retirement age in the contract of service of the claimant, the court's task is to determine whether the claimants' retirement after he had attained H the age of 55 was nevertheless a termination of his service without just cause or excuse.

In the light of the peculiar facts of the present case, the chairman of the second respondent rightly identified the issue before it and stated as follows at pp 20–21 of the principal award (see pp 252–253 and pp 257–259 of I encl 3):

> In this case, however, the company is unable to rely upon a contractual provision stipulating that the claimant ought to retire at 55. When retired one

> year and three months after he attained that age the claimant complains that he had been dismissed without just cause or excuse. He claims that employees in his category normally retire at 60. The court is of the opinion that the claimant ought to be permitted to contend that in the absence of a contractually agreed retirement age, he is entitled to work up to the normal retirement age of employees in his category. This requires a determination of what that normal retirement age is, an issue which the court will now address.

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In the circumstances of the instant cases the second respondent had to determine what was the normal retirement age for employees in the claimants' category, so as to enable it to determine the issue of whether the applicants' termination at 55 was with or without just cause or excuse. The chairman of second respondent correctly stated at p 28 of the award (see pp 260–266 of encl 3) as follows:

C

> This bring us to the crux of the matter in this case, and that is the issue whether there was, in the absence of a contractual retirement age for the claimant, a normal retirement age for employees in the claimant's category.

D

I am of the opinion that the absence of a retirement clause in the applicants' employment however did not mean that the first respondent can never bring the applicants' services to an end or that the applicants have a right to a life-long employment. I am further of the opinion that due to this lacuna, the applicants were entitled to work up to the normal retirement age of the employees in their category and the normal retirement age in the circumstances of these cases was 60 and not 55. It is pertinent to note that the Industrial Court is a court of equity and good conscience and by virtue of s 30(6) of the Act, the Industrial Court has wide discretion to include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling a reference under s 20(3) of the Act. In the Supreme Court case of *Bharat Bank Ltd Dehli, The v The Employees of Bharat Bank Ltd Dehli and The Bharat Bank Employees' Union Dehli* AIR 1950 SC 188, BK Mukherjee J, succinctly laid down the functions of the Industrial Tribunal at p 209:

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> In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace. An industrial dispute as has been said on many occasions is nothing but a trial of strength between the employers on the one hand and the workmens' organization on the other and the Industrial Tribunal has got to arrive at some equitable arrangement for averting strikes and lock outs which impede production of goods and the industrial development of the country. The Tribunal is not bound by the rigid rules of law. The process it employs is rather an extended form of the process of collective bargaining and is more akin to administrative than to judicial function. In describing the true position of an Industrial Tribunal in dealing with labour disputes, this court in *Western India Automobile Association v Industrial Tribunal, Bombay* [1939] FCR 321 at p 345; AIR 1949 FC 111, quoted with approval, a passage from Ludwig

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A Teller's well known work on the subject, where the learned author observes that:

> 'industrial arbitration may involve the extension of an existing agreement or the making of a new one or in general the creation of new obligation or modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes
> B relating to existing agreements.'

Part of the aforesaid passage was cited with approval by Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 at p 312 when he said:

> The judgment of Gajendragadkar J also cited with approval a passage from the judgment of Mukherjee J in *Bharat Bank Ltd, Delhi v Employees of the Bharat*
> C *Bank Ltd, Delhi* at p 209 which perhaps deserves to be quoted:
>
>> 'In settling disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to
>> D give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.'

In *Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor* [1991] 2 MLJ 115, Edgar
E Joseph Jr J (as he then was) in considering the power of the Industrial Court to create rights and obligations which it considers essential for keeping industrial peace stated obiter at pp 121–122 as follows:

> To put the matter in perspective, the provisions of the Industrial Relations Act 1967 which it is convenient to set out are sub-ss (4), (5)[, (5A)] and (6) of
> F s 30. These provisions read as follows:
>
> (4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.
>
> (5) The Court shall act according to equity, good conscience and the
> G substantial merits of the case without regard to technicalities and legal form.
>
> (5A) In making its award, the Court may take into consideration any agreements or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister.
>
> H (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).
>
> I As a matter of first impression — and many questions of construction are matters of first impression — the breadth of the powers conferred upon the Industrial Court is considerable. This may well have accounted for the

> Federal Court in *Dr Dutt*'s case taking the view that the Industrial Court could properly award compensation where a dismissal was without just cause or excuse, if in its considered view it did not consider reinstatement should be ordered even though such power is nowhere found within the four corners of the statute. In this context, I would add that reference by the Federal Court (with approval) to the passage in the judgment of Mukherjee J was clearly not obiter dicta, as suggested by counsel for the company, since the question of the power of the Industrial Court to award such compensation was one of the questions which arose acutely for decision at all levels in that case.
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> Secondly, the dicta to be found in the judgments in the Indian cases on the functions and powers of Industrial Tribunals referred to by the Federal Court in *Dr Dutt*'s case, are based not on art 38 of the Indian Constitution and its Directive Principles of State Policy, as argued by counsel for the company, but on the following statement by Ludwig Teller in his book, entitled *Labour Disputes and Collective Bargaining* Vol 1 at p 536:
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>> 'Industrial arbitration may involve the extension of an existing agreement, or the making of a new one or in general the creation of new obligations or the modification of old ones, while commercial arbitration concerns itself with interpretation of existing obligations and disputes relating to existing agreements.'
>
> On the contrary, I am satisfied that the power of the Industrial Court to create new rights and obligations is derived from sub-ss (4), (5) and (6) of s 30 of the Industrial Relations Act 1967 (reproduced above), though, it goes without saying, that this is a power which must be exercised reasonably and not arbitrarily.

The Indian Supreme Court in the case of *Rothas Industries Ltd v Brijnandan Pandev & Ors* Air 1957 SC 1, made a distinction between commercial and industrial adjudication undertaken by law courts and the industrial tribunals respectively and highlighted it as follows at p 6:

> A court of law proceeds on the footing that now power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect the legitimate trade union activities and to prevent unfair practices or victimization.

It is observed that in the instant cases both the applicants were in fact subject to a retirement age of 55 years as contended by the first respondent. In determining this issue, the chairman of the second respondent correctly found that the test propounded and applied in *Waite v Government Communications Headquarters* [1983] ICR 653 (HL) should apply and stated as follows at pp 29–30 of the award (see pp 261–262 and pp 267–268 of encl 3):

> The court is of the view that bearing in mind the social policy objectives of the Industrial Relations Act 1967, the test propounded and applied in *Waite* for determining the normal retirement age of an employee ought to apply in a case such as the present where the court is confronted with an employment contract which is silent on the matter of retirement age and where no term fixing such age can be properly implied by the court. In doing so, the court is

A fully cognizant of the fact that in *Waite* the House was dealing with the construction of statutory term 'normal retirement age' contained in the Employment Protection (Consolidation) Act 1978 and that no such equivalent concept of normal retirement age exists in the Industrial Relations Act 1967.

> The court's task is therefore to discover what is the reasonable
B expectation or understanding of the employees at the relevant time concerning the matter of the age at which they can reasonably expect to be compelled to retire. In undertaking this exercise, the court has to consider all relevant facts and circumstances of this case which constituted the employment relations between the company on the one hand and its employees and the claimant on the other.

C In *Waite v Government Communication* Lord Fraser of Tullybelton stated at p 662:

> I therefore reject the view that the contractual retiring age conclusively fixes the normal retiring age. I accept that where there is a contractual retiring age, applicable to all, or nearly all, the employees holding the position which the D appellant employee held, there is a presumption that the contractual retiring age is the normal retiring age for the group. But is a presumption which, in my opinion, can be rebutted by evidence that there is in practice some higher age at which employees holding the position are regularly retired, and which they have reasonably come to regard as their normal retiring age. ... The proper test is in my view not merely statistical. It is to ascertain what would be the E reasonable expectation or understanding of the employees holding that position at the relevant time. The contractual retiring age will prima facie be the normal, but it may be displaced by evidence that it is regularly departed from in practice. The evidence may show that the contractual retirement age has been superseded by some definite higher age, and, if so, that will have become the normal retiring age. Or the evidence may show merely that the contractual retiring age has been abandoned and that employees retire at a F variety of higher ages. In that case there will be no normal retiring age and the statutory alternatives of 65 for a man and 60 for a woman will apply.

Therefore, in the instant cases the second respondent had to determine the following:

G (i) the normal retirement age of employees in the applicants' category. However, this normal retirement age would merely be treated as a presumption; and

(ii) whether the aforesaid presumption is rebutted by evidence showing that the normal retirement age is other than that determined at (i).

H However, it is observed that although the second respondent rightly identified the issue to be determined at p 28 of the award (see p 260–266 of encl 3), it in fact and in reality failed to determine this issue. The second respondent has committed a jurisdictional error of law and as such the impugned award suffers from infirmity on the ground of illegality and perversity. It is pertinent to note that the subsequent findings of the I chairman in relation to the normal retirement age of the first respondent at pp 30–34 of the impugned award (see pp 262–266 and pp 268–272 of encl 3) is erroneous in its entirety as the chairman failed to address his mind to and take into consideration, his earlier findings of facts made in the impugned award. In fact the second respondent instead took into consideration several irrelevant matters.

The chairman of the second respondent concluded at p 31 of the award (see pp 263–269 of encl 3) as follows:

> Bearing in mind that the court's inquiry is into the question whether the claimants' termination of employment by retirement was for just cause or excuse, and applying the principle enunciated in the decision of another division of the court in the case *Assunta Hospital*, the court is of the opinion that the company's stipulation of the retirement age for its employees set out hereinabove is reasonable and proper.

Later at p 34 of the award (please see pp 266–272 of encl 3) the second respondent concluded:

> The reference to 55 as the retirement age at certain points of the history of the relationship between the company and its employees when employment matters were dealt with as reflected in the successive collective agreements and the company's HRDPPG is indicative of 55 being the normal retirement age of the company.

The chairman of the second respondent highlighted its finding at p 4 of the Secondary Award in relation to Usul Pemula No R3–25–93–98 as follows (see p 237 of encl 3):

> The court has held in Award No 368 of 1998 that the company may, in the absence of any contract term providing for retirement, stipulated a retirement age of 55 in its HRDPPG.

It is clear from the aforesaid conclusion of the chairman of the second respondent that the fundamental basis upon which it arrived at the said conclusion was based on the normal retirement age of 55 set out in the collective agreements and the same stipulation as provided in the HRDPPG. I therefore come to the conclusion that the aforesaid conclusions arrived at by the second respondent was in total contradiction with the chairman's findings of facts made at pp 7 to 11 of the award (see pp 239–243 and pp 245–249 of encl 3) wherein the second respondent concluded that both the collective agreements and the HRDPPG were inapplicable to both the applicants. In the recent Indian decision of the Bombay High Court in *M/s Saudi Arabian Airlines v Mrs Shehnaz Mudbhatkal & Anor* (1999) 81 FLR 767, it was stated that perversity in findings are to be judged by three tests which is stated as follows:

> Perversity in findings can arise only if (a) there is no evidence whatsoever to support the finding, or (b) the conclusions recorded are diametrically contrary to the evidence on record or (c) that the conclusions are such that no reasonable person would have arrived at.

In the instant case it is much in evidence that the impugned award is perverse as not only is the final conclusion of the second respondent diametrically contrary to the evidence on record and findings mentioned hereinabove, but also the final conclusion is also such that no reasonable person would have arrived at.

A In the case of *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, Abdoolcader SCJ, in delivering the majority decision of the Supreme Court, stated as follows at p 206:

> But the [reasoning in the case of] *R v Nat Bell Liquors Ltd* [1922] 2 AC 128, B on which the result (the rejection of 'no evidence' as a jurisdictional ground of review) was based, was wrong, and always had been. There have always been jurisdictional grounds of review for errors committed in the course of an inquiry validly commenced. Fraud, breach of natural justice, and applying the wrong test are the easiest examples. These are all vitiating errors occurring in the course of an inquiry properly commenced, and yet the *Nat Bell* theory of C jurisdiction was not finally rejected until the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. It is now possible but no longer necessary to treat factual error as unreviewable, and I would refer in this regard to the passage in my judgment in *Chan Siew Kim v Woi Fung Sheng Tim Medical Store & Anor* [1978] 1 MLJ 144 (at p 146) which I have adverted to earlier.
>
> D The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly. I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* E [1987] 1 MLJ 124 where in dealing with the question of unreasonableness I alluded (at pp 129–130) to Lord Diplock's exegesis in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 (at p 821) in regard to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps be amiss to refer in this context to Dunn LJ's assertion in *Reg v Secretary of State for the Home Department, ex p Asif Mahmood Khan* F [1984] WLR 1337 (at p 1352) that 'the categories of unreasonableness are not closed ...' Mason J said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299 (at p 310) that it might be possible to challenge a decision which has:
>
> > '... failed to give adequate weight to a relevant factor of greater G importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations (or the taking into account of irrelevant considerations), but that the decision is 'manifestly unreasonable' ... (A) court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing H the decision on its merits.'
>
> A line of cases has recently emerged which asserts a judicial power to review decisions upon the ground that they lack a rationally probative basis in fact. The first case was *Reg v Deputy Industrial Injuries Commissioner; ex p Moore* [1965] 1 QB 456 in which Diplock LJ stated (at p 488) that natural justice I requires decision-makers to base their decisions 'upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event which would be relevant. It means that (the decision-

> maker) must not spin a coin or consult an astrologer ...'. *Ex p Moore* has been approved in Australia in *Minister for Immigration and Ethnic Affairs v Pochi* [1980] 31 ALR 666 (at pp 688–690, per Deane J). A

In my opinion in the instant case in reality there appears to be no basis upon which the second respondent arrived at its conclusion that the normal retirement age is 55. The impugned award suffers from irrationality and perversity. B

The chairman of the second respondent, in determining the company's normal retirement age, stated, inter alia, at p 33 of the award (see p 265 of encl 3) in Award No 368 of 1998:

> There is also the matter of the claimant's extension of his employment for a period of 1 year and 3 months beyond his 55th birthday (exh COB-8/y-4). The company expressly referred to the fact that the claimant had attained the retirement age of 55 on 23 March 1995 and was extending his service to 30 June 1996 upon his supervisor's recommendation. C

Later at p 34 of the award the chairman of the second respondent held thus (see p 266 of encl 3): D

> Together with the earlier stated matters, the company's actions at certain defining moments of the claimant's career, inter alia, his promotion to a managerial position and the extension of his service when he attained the age of 55 compels the court to view that the claimant had no reasonable basis for contending that he had the reasonable expectation to retire at the age of 60. E

It must be observed that the fact that the first respondent extended the applicant's service after he had attained 55 does not in any manner prove that the normal retirement age of employees in the applicant's category is in fact and in reality at the age of 55. It is evident from the applicant's uncontroverted testimony during the hearing before the second respondent that the applicant had protested against the purported extension of service (see pp 30–31 of encl 6) and thus, had at no time agreed, whether by implication or otherwise, to the variation made by the applicant vide the purported extension. He said in evidence: F

> G After I received exh 'Y4', I was surprised. I raised my protest. I informed the Director of the Personnel Department but he refused to see me. The Human Resources Director, Mohd Maidon asked me to send a representative to see him. I sent Michael Chin to see him as both of us were given the letter. Before exh Y4 was given, no one in the company had discussed with me about my having to retire at 55.

H In respect of Award No 369 of 1998, it is evident as well from the applicant's testimony that he had protested (see p 21 of encl 6). He testified:

> This letter was given to me by Salamat Kassim. I did not accept it because I contended that my retirement age is 60 years old and not 55. I came into possession of this letter in the following way: I contacted my more experienced colleague to take back the letter in order to have it in black and white. Later on I did appeal. After that I took back the letter from Gurmit Singh who is not my immediate superior but in charge of my section. I was not happy. Later I I

> referred to my counsel. I appealed to all my Directors. I told them I am entitled to retire at 60. Almost none of the staff retire at 55.

Later at p 24 of encl 5:

> [Exhibits COB-6 & 7 referred]
>
> Q Did you receive this?
>
> A Yes.
>
> Q Did you immediately reply to this letter to say that you did not accept the contents?
>
> A I was not happy. I approached the Director.
>
> Q Did your write?
>
> A Yes.
>
> Q Exhibit C-4?
>
> A Yes.

It is also pertinent to note that the first respondent did not call its Human Resource Director, one En Mohamad Maidon as a witness. It is a principle of industrial law that the person who decides to dismiss the applicant must be called as a witness. The failure to call him meant that the applicant could not cross examine him about the retirement process in the company and why he decided to retire the applicant at 55. The second respondent in the present case failed to address this issue in the award. In the case of *Cygal Bhd v Issam Abdul Rahman* [1998] 3 ILR 44, the Industrial Court held as follows at p 48:

> Although the company tried to prove that the termination letter relied only on the absence of the claimant as the reason for terminating the claimant's service the court believed that it did so after receiving the claimant's solicitors' letter. Although the company's letter was dated 16 July and did not refer to the solicitors' letter the company only posted the letter on 21 July as evidenced by the post mark on the envelope (exh 'C118'). The company's executive director who dismissed the claimant was not called as a witness to enlighten the court what was the real reason why the claimant was dismissed. In the case of *Tetracon Engineering Sdn Bhd v Abdul Latif Che Mat* [1997] 1 ILR 31 cited by learned counsel for the claimant the learned chairman said:
>
>> 'The court agrees with the claimant's submission that the director who made the decision to dismiss the claimant, one Rahguram should have been called. His evidence as to the actual reason for the claimant's dismissal is crucial since he is the dismissing authority. The court is left with the evidence of COW1 who does not even have personal knowledge of the events.'
>
> The court agrees that the evidence of the dismissing authority would have assisted the court in determining the real reason for the claimant's dismissal. In the absence of the testimony of the executive director of the company the court is justified in the circumstances of the case to conclude that it dismissed the claimant not because of the two or three days absence but because of the claimant's objection to performing both the functions of the post of senior project engineer and resident engineer of the project.

It is observed that in the absence of the testimony of the Human Resource Director, the second respondent was only left with the evidence of the

> Manager of Employees Relation, one En Saadullah bin Johan (COW1) who was not personally involved in the retirement process. I am of the view that since the first respondent had failed to call a material witness to explain and clarify to the court about the retirement process of the first respondent or even to rebut the applicant's contentions, an adverse inference under s 114(g) should be drawn against the first respondent. Moreover from the evidence adduced before the second respondent, there was nowhere to be found that the applicant had agreed to the variation, whether by implication or otherwise but only the applicant had received the said letter (see exh 'YKF-2' at p 14 of encl 3) purporting to extend his services. This cannot be said to amount to the variation of the retirement age by the first respondent.

In Industrial Court case of *Sports Toto Malaysia Sdn Bhd v Wong Yat Sing* [1995] 1 ILR 747, the claimant contended that the company had unilaterally imposed a retirement age of 55. He argued that there was nothing stated in the letter of appointment to indicate the action. At the hearing, the company testified the encumbrance clause entrenched in the letter of appointment fettered the claimant to changes introduced by the company, thereby giving the employer mandate to retire its employees at the age of 55. The claimant however, refused claims that he had been duly informed of retirement at the age of 55. In any event, he had never acceded to this, as the staff had made an official protest. Furthermore, the claimant stated that there had been several employees who had worked in the company after the age of 55 years, who had been given termination benefits. The chairman in dealing with the evidence before him, held thus at p 749:

> From the evidence adduced and from all the documents tendered in court there was nowhere to be found that the claimant had agreed to the variation whether by implication or otherwise but only acknowledged to have received the company's letters to him. Acknowledgement by the claimant is not tantamount to his consent on the variation of retirement age by the company.

This decision of the Industrial Court was upheld by the High Court in Originating Motion No R2–25–65–1995.

In *Malakoff Bhd v Kuppusamy & Ors* [1991] 1 MLJ 39, KC Vohrah held that the respondents were entitled to their claims for termination benefits when the estate retired them at the age of 55 as the collective agreement was silent on retirement age. KC Vohrah J stated at pp 40–41:

> The 19 respondents were originally employees of Kew Man & Co Sdn Bhd ('Kew Man') and worked at Kuala Muda Estate, Sungei Petani. In 1983 Kew Man entered into a collective agreement ('the Kew Man Work Agreement') with the National Union of Plantation Workers ('NUPW') in which the 19 respondents together with other employees of the estate were members in benefit.
>
> Kew Man sold Kuala Muda Estate where the 19 respondents had their employment to Malakoff Bhd, the appellants, and the change of ownership took place on 15 February 1986.
>
> It is not disputed that on this date, 15 February 1986, the appellants offered continued employment to all former employees of Kew Man at Kuala Muda Estate including the 19 respondents without a break in service in the same capacity and on the same terms and conditions as set out in the Kew

> Man agreement. The 19 respondents accepted the offer and continued their service under the appellants with the Kew Man Agreement governing their terms and conditions of service.
>
> The Kew Man Agreement, when it was entered into between Kew Man and NUPW, was under cl 11(a), expressed to be for a period of three years from 1 October 1983 and 'thereafter, until superseded by a new agreement or terminated as provided herein'. In other words it was supposed to expire only on 30 September 1986 and if there was no new agreement the Kew Man Agreement was to continue in force.
>
> On 23 June 1986, before the expiry of the Kew Man Agreement, about four months after taking over the Kuala Muda Estate, the appellants issued to each of the 19 respondents one month's notice of termination of service either on the ground that the worker had attained or that he was past the retirement age of 55. And the 19 stopped work on 23 July 1986.
>
> The 19 respondents say that under the Kew Man Agreement there is no clause relating to the age for retirement. That being so they argue that they are entitled to termination benefits payments under reg 4(1)(a) of the Employment (Termination and Lay-off Benefits) Regulations 1980 (PU(A) 338 of 1983) ('the Regulations') which reads:
>
> > '... an employee shall be entitled to termination benefit payment where his contract of service is terminated for any reason whatsoever otherwise than —
> >
> > (a) by the employer, upon the employee attaining the age of retirement if the contract of service contains a stipulation in that behalf; ... .'
>
> The appellants, however, say that the respondents are governed by and are entitled to retirement benefits not under the Kew Man Agreement but under Industrial Court Award No 111 of 1986; and that art 44 of the award stipulates the age of retirement as 55 and that the 19 respondents were retired under the stipulation and therefore are not entitled to termination benefits. It is necessary, however, to give a background of Award No 111 of 1986.

KC Vohrah J added at p 42:

> I do not see how it can be said that the enquiry officer erred when he made a finding that the Kew Man Agreement applied to the 19 respondents. The said Kew Man Agreement was silent on the age of retirement and therefore the 19 respondents were entitled to their claim for termination benefits payments under reg 4(1)(a) of the Regulations. The appeal is dismissed with costs.

I am of the opinion that in the absence of a contractually agreed stipulation in relation to retirement age being 55, the applicant was entitled to work up to the normal retirement age of employees in his category, which age was to be determined by the second respondent. Thus the second respondent had committed a jurisdictional error of law and that the impugned award suffers from infirmity on the ground of 'illegality' and 'irrationality' as it failed to determine the crux of the issue before it namely, what was the normal retirement age of employees in the applicant's category, but instead purportedly decided the normal retirement age of employees in the first respondent generally. In the case of *Rama Chandran* Edgar Joseph Jr FCJ held thus at p 187:

A In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:

> B 'By "illegality" as a ground for judicial review I mean that the decision-maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> C By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp*). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. D To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow*, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.'

E The chairman of the second respondent held thus at p 34 of the award (see p 266 of encl 3):

> F The reference to 55 as the retirement age at certain points of the history of the relationship between the company and its employees when employment matters were dealt with as reflected in the successive collective agreements and the company's HRDPPG is indicative of 55 being the normal retirement age of the company.

The chairman of the second respondent held at p 4 of the Award No 369 of 1998 (see p 237 of encl 3) as follows:

> G The court has held in Award No 369 of 1998 that the company may, in the absence of any contractual term providing for a retirement age, stipulate a retirement age of 55 in this HRDPPG.

A perusal of the impugned award reveals that the second respondent in arriving at the aforesaid conclusion took into consideration the following:

H

(i) the normal retirement age of 55 set out in the collective agreements;

(ii) the stipulation of the retirement age of 55 in the HRDPPG; and

(iii) the first respondent's purported extension of the applicant's service after he had attained 55 years of age (see exh 'YKF-3' at p 16 of encl 3); and

I

(iv) exh 'R-1' of the first respondent's affidavit in reply (affirmed on 30 November 1999) pertaining to the loan facility.

It is noted that items (i) and (ii) were in total contradiction to the chairman's findings of fact at pp 7–11 of the award and item (iii) had no reasonable basis for conclusion that the normal retirement age was 55. As for item (iv) is concerned, this loan documents did not in any manner prove the normal retirement age of the first respondent of employees in the applicant's category. In fact, this loan document ought not have been considered in the first place due to the following reasons:

(i) did not expressly state that the first respondent's normal retirement age was 55 nor did it expressly state his non-eligibility was due to the fact that he was to retire at 55; and

(ii) the applicant did not even avail himself of the said loan facility.

These factors were evident from the applicant's testimony before the second respondent (see p 31 of encl 6):

> … before exh 'Y-4' was given, no one in the company has discussed with me about my having to retire at 55.
>
> …
>
> [Exhibit COB-85 referred]
>
> I did receive this letter. I did not make use of this loan facility
>
> …

In respect of Award No 369 of 1998, it is evident from the applicant's testimony before the second respondent (see p 22 of encl 6):

> [Exhibit C2 referred]
>
> … Before this was issued, my superior did not have a discussion with me about my having to retire.
>
> Before 27 April 1995, the company did not inform me that my retirement age was 55.

It is further evident from COW-1's testimony which is as follows (see p 18 of encl 6):

> [Exhibit COB pp 84 and 85 referred]
>
> Q Claimants did not avail themselves of this revised facility?
>
> A These two letters were in response to application by the claimants. There is no evidence from the personal file that they did take the loans.

In fact COW-1 had testified during cross-examination that the applicants did not avail themselves of the said loan facility (see p 18 of encl 6):

> [Exhibits 84 and 85 referred]
>
> Q Claimants did not avail themselves of this facility?
>
> A These two letters were in response to application by the claimants. There is no evidence from their personal files that they did take the loans.

In the light of the aforesaid, it is clear that the impugned awards are perverse as there was no evidence whatsoever to support the second respondent's conclusion that the applicant's retirement age was 55 years.

It is clear that the fundamental basis upon which the second respondent arrived at its conclusion at p 34 of the impugned award (see p 266 of encl 3) was the collective agreements and the HRDPPG which it had found as a fact to be irrelevant and inapplicable in the circumstances of this case. As such, the impugned award is manifestly unreasonable.

It was argued by the first respondent that the applicant's case in the Industrial Court that he was entitled to retire at the age of 60 was not pleaded in the statement of case. A reading of the pleaded case for the parties (see pp 18–29 and pp 30–38 respectively, of encl 3), the issue that fell for consideration for adjudication before the second respondent was whether in the absence of a retirement age in the applicants' contract of employment, the applicants will still subject to a retirement age of 55 as contended by the first respondent. In fact the applicant in Award No 369 had pleaded that he was entitled to retire at 60 and not 55 (see para 7 of the statement of case at p 21 of encl 3).

It is abundantly clear from the pleadings that the applicants were complaining that by forcibly retiring them at 55 years, the first respondent had unilaterally varied the terms and conditions of their contract.

Upon making findings of fact that there was neither an express nor implied stipulation in the applicant's contract of employment that 55 or 60 is the retirement age of the applicants, the chairman of the second respondent correctly identified the issue and stated as follows at pp 20–21 of the award (see pp 252–253 of encl 3):

> In this case, however, the company is unable to rely upon a contractual provision stipulating that the claimant ought to retire at 55. When retired one year and three months after he attained that age the claimant complains that he had been dismissed without just cause or excuse. He claims that employees in his category normally retire at 60. The court is of the opinion that the claimant ought to be permitted to contend that in the absence of a contractually agreed retirement age, he is entitled to work up to the normal retirement age of employees in his category. This requires a determination of what that normal retirement age is, an issue which the court will now address.

Later at p 28 of the award (see p 260 of encl 3) the chairman held:

> This brings us to the crux of the matter in this case, and that is the issue whether there was, in the absence of a contractual retirement age for the claimant, a normal retirement age for employees in the claimant's category.

In respect of Award No 369 of 1998, the chairman of the second respondent correctly identified the issue and stated as follows at p 4 of the said award (see p 237 of encl 3):

> In the absence of either an express or an implied term stipulating the claimant's retirement age in the contract of service of the claimant, the court's task is to determine whether the claimant's retirement after he had attained the age of 55 was nevertheless a termination of his service without just cause or excuse.

Therefore the issue that was left to be determined by the second respondent was in fact the legal consequences in the absence of an express or implied stipulation as to retirement ages applicable to the applicants.

I am of the view that only material facts may be pleaded and not the legal consequences following them. In the English House of Lords' decision in *Lever Bros Ltd v Bell* [1931] 1 KB 557, Scrutton LJ stated as follows at pp 582–583:

> As to the pleading point, I think it is correct to say that the plaintiffs did not allege in their pleadings mutual mistake as a ground for treating the contract for payment as void and recovering the money paid under it. Clause 26 of the claim, repeated in the amended claim, was as follows: 'Alternatively the said agreements and each of them were made and the moneys paid thereunder were paid under a mistake of fact,' but the particulars of this paragraph in the letter of 21 January 1930, I think refer only to the mistake of the plaintiffs. In my opinion the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal results alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial.

It is pertinent to note that even at common law the rule as to pleadings is observed as a matter of giving notice to one's opponent of the points that are being taken in support of one's case. Raja Azlan Shah CJ (as DYMM then was) put it in *KSP Mohamed Ali v KEP Mohamad Ismail* [1981] 2 MLJ 10 at p 12 as follows:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

In the instant case, the first respondent was aware that it had been the applicants' stand all along that they had a reasonable expectation to retire at 60 as there was no stipulation as to their retirement age in their contract of employment and their contemporary in the first respondent had retired at 60 thus, it cannot be said that the first respondent was taken by surprise at all.

I agree that the Industrial Court must have regard to the pleadings in deciding a dispute. In *R Ramachandran v Industrial Court of Malaysia & Anor*, Eusoff Chin Chief Justice of Malaysia held at p 178:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30 of the Act) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at

> all times keep itself alert to the issues and attend to matters it is bound to consider. In this case, the Industrial Court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on retrenchment exercise, it is not bound, and therefore not obliged to consider the issues of bias and misconduct.

However, it is to be noted that earlier on in the same judgment, the Chief Justice made the following observation:

> It is clear that the claimant, had in his statement of case before the Industrial Court, raised the issue of bias, although the word 'bias' was not actually used.

It is also to be noted that there was never any objection by the first respondent's solicitors pertaining to the applicant's solicitors' eliciting evidence on this issue. Therefore in the absence of any objections that the issue was not pleaded and the act of allowing evidence amounted to a waiver and thus, no objection by the first respondent pertaining to this issue is allowed or entertained at this stage.

In a recent decision of the Court of Appeal in *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144, the Court of Appeal at pp 152–153 stated:

> Before the Industrial Court, NUPW by way of para 4 of the statement of case pleaded that the dismissal was without any or any just cause or excuse. The detailed facts may not have been pleaded but it is a matter of presenting the evidence to support the ground to be relied on by the party. In any event, from the appeal record, the issue of condonation was fully placed and argued before the Industrial Court. The Industrial Court therefore properly considered this issue in its judgment and found favour with NUPW. The same issue was again fully argued before the High Court and the learned judge considered this issue at length in his judgment but, however, did not agree with the finding of the Industrial Court and we will advert to this issue later.
>
> In our view, even if this issue of condonation was not specifically pleaded, the fact that this issue was fully argued both in the Industrial Court and the High Court without any objection, would be too late in the day for KJSB'S counsel to contend that this issue be precluded from being relied on by NUPW as a ground. In this respect the Supreme Court in *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 in dealing with the issue of certain defences were not pleaded and ought to be disregarded under O 18 r 7(1) of the Rules of the High Court 1980 but not objected to by the plaintiffs, held (at p 185):
>
> > (1) The underlying well known rationale for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts. However, when evidence represented a departure from the pleadings, it should be objected to when and where it was adduced, and it would be too late when it was only objected to later on, as in the final submission at the close of evidence in the instant appeal. Otherwise in the event of such an objection being accepted by the court, the party adducing such evidence may face the risk of being denied leave to amend his pleadings at that stage.

> (2) Moreover, in the instant appeal evidence bearing on the two alleged defences was not such a radical departure but a mere development of what had been alleged by the defendants. Therefore, although the two alleged defences were material facts which ought to be pleaded, such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.
>
> In our view, *Amanah Butler* and *R Rama Chandran* can therefore be distinguished with the present case and following *Superintendent of Lands & Surveys (4th Div) & Anor*, the contention of counsel for KJSB could not be accepted by us as the issue, as stated earlier, was fully canvassed and argued both in the Industrial Court and the High Court by both parties without any objection. In fact the issue of condonation was put to the manager of KJSB by way of cross-examination though referred to as waiver without any objection (p 393 of the appeal record).

Similarly in the instant case the applicant's contention that they had a reasonable expectation to retire at 60 as there was no stipulation as to their retirement age in their contracts of employment was in fact fully placed and argued before the second respondent. As such, even if the aforesaid was not specifically pleaded, since it was fully argued and submitted on before the second respondent without any objection, I am of the opinion it is now too late in the day for the first respondents to contend that this issue cannot be relied on by the applicants.

The chairman held at p 34 of the award (see p 266 of encl 3) as follows:

> Together with the earlier stated matters, the company's actions at certain defining moments of the claimant's career, inter alia his promotion to a managerial position and the extension of his service when he attained the age of 55 compels the court to view that the claimant had no reasonable basis for contending that he had the reasonable expectation to retire at the age of 60.

In respect of Award No 369 of 1998 the said chairman held as follows (see p 237 of encl 3):

> However, on the evidence, in the joint hearing the court was unable to find that the company has a normal retirement age of 60 for staff in the said category.

It is pertinent to note that in arriving at its conclusion above the chairman of the second respondent had clearly relied on the reference to 55 as the collective agreements and the HRDPPG as the retirement age coupled with exhs 'R-1' and 'R-2' of the first respondent's affidavit-in-reply pertaining to the loan facility and the applicant's purported extension of service. However, prior to arriving at the said decision, the chairman in dealing with the applicant's evidences stated, inter alia, as follows at pp 33–34 of the award (see pp 265–266 of encl 3):

> The claimant has stated in a general way that he expected to retire at 60. He refers to 3 of his colleagues including one Tony Ho who retired at the age of 60. There is also the bald statement by Michael Chin that in his category of employees, almost nobody retires at 55. It is difficult thing for the court to find

> on such meager evidence that the company's normal retirement age for the category of staff retirements at the age of 60 without any indication of its statistical relevance does not advance the claimant's case very far. Had the evidence been that the claimant's retirement at 55 was out of the company's norm, the court might well be constrained to inquire into the question why the claimant did not have the benefit of an extension of his service beyond the age of 55 to 60.

In a case of direct dismissal, the burden of proof always lies with the first respondent to prove the reasons advanced for the applicant's dismissal, ie that the applicant had attained normal retirement age at 55 in the absence of an express stipulation as to retirement age in the applicant's contract of employment. The first respondent must produce 'convincing evidence that the normal retirement age of employees in the applicant's category is 55'. The failure to prove this on a balance of probability, must inevitably result in the dismissal being without just cause or excuse. Therefore, the burden of proving that the normal retirement age was 55 was on the first respondent, not on the applicant. As such, the onus was on the first respondent to adduce sufficient evidence to establish the number of employees in the applicant's category, who had been retired at 55 and their respective job functions. The burden was not on the applicant. It is thus clear, that based on the findings of fact of the chairman of the second respondent at p 33 of the impugned award as stated above, the second respondent had placed the burden on the applicant to prove that the first respondent's normal retirement age for the category of employees to which the claimant belonged to was 60 (see p 265 of encl 3). In the instant case the applicants had no burden of proof but only an evidential burden. When a party has an evidential burden such a burden can be discharged by production of evidence which falls short of proof. Therefore, the evidential burden was an obligation to show that there was sufficient evidence to raise an issue as to the existence or non-existence of the facts in issue. In the light of the claimant's evidence as stated at p 32 of the award (see p 264 of encl 3), it was clear that the applicants had discharged this burden by raising an issue, by way of his evidence, that the normal retirement age of employees in his category was 60 and not 55 and this issue raised was in fact not rebutted by evidence by the first respondent. The impugned award therefore suffers from infirmity on the ground of illegality.

I am of the opinion that based on the principle in *Waite*'s case, the applicants had a reasonable basis of contending that they had the reasonable expectation to retire at 60 and not 55. The first respondent's contention that the normal retirement age of its employees was 55 can be rebutted by the following:

(i) COW-1 testimony that the first respondent had in its employ a number of workers, who were the applicant's contemporaries, and who had worked in the first respondent till the age of 60;

(ii) the finding of fact of the second respondent that the normal retirement age of 55 as stipulated in the HRDPPG and the collective agreements did not apply to the applicant;

(iii) the finding of fact of the second respondent that it was not possible to imply 55 as the contract retirement age;

(iv) the applicant's uncontroverted testimony that he was informed by one Mr Tony Ho, the then Finishing Department Supervisor, at his first appointment and promotion to the management level that he would retire at 60;

(v) the applicant's uncontroverted testimony that the said Mr Tony Ho and two other of the applicant's colleagues retired at the age of 60. In respect of Award No 369 of 1998 the applicant's uncontroverted testimony that prior to his retirement none of his colleagues retired at the age of 55;

(vi) the fact that the first respondent never adduced any rebuttal evidence in relation to applicants' aforesaid contentions;

(vii) the applicants' uncontroverted testimony that he never agreed to the unilateral imposition of the retirement age and had in fact protested against the same; and

(viii) in the light of the contra proferentum rule, which is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself (see *Chitty on Contracts — General Principles* (26th Ed)).

In *Shapadu Energy & Engineering Sdn Bhd v Stuart Ashley Eban* (OM No R2–25–112–98 — unreported) pertaining to dispute between employer and employee involving the terms of employment at pp 6–7 of the judgment, Azmel J said:

> Hence in a dispute between the employer and the employee the court would be more inclined to decide more favourably towards the employee. Therefore in order to avoid such adverse inference by the court it would be in the best interest for the employer to issue written letter of employment to its employee so that no doubts can be created as regard the terms of employment of the employee.

In the case of *Mears v Safecar Security Ltd* [1982] 3 WLR 366 at p 368 (CA) it was stated:

> *Per curiam*. Section 11 would seem to impose on the tribunal the statutory duty to find the specified terms and in the last resort to invent them for the purpose of literally writing them into the contract. If the tribunal have not enough material in the facts and circumstances of the case, to determine what should have been agreed, bearing in mind that it is the employer's breach of his statutory duty which has made the employee's application for a reference necessary and that in consequence the tribunal would generally be right to resolve doubt about what particulars ought to be included in favour of the employee (post p 385D–F).
>
> Decision of the Employment Appeal Tribunal [1981] 1 WLR 1214; [1981] ICR affirmed).

Stephenson LJ at pp 380–381 stated as follows:

> But without departing from the majority view of the facts and the inferences to be drawn from them, I am of the opinion that when, in exercising their

> statutory jurisdiction under s 11, an industrial tribunal have to imply and insert missing terms, they are not tied to the requirements of the test propounded by Scrutton LJ and Mackinnon LJ, a test for commercial contracts which goes back to *The Moorcock* (1889) 14 PD 64, but can and should consider all the facts and circumstances of the relationship between the employer and employee concerned, including the way in which they had worked the particular contract of employment since it was made, in order to imply and determine the missing term which ought to have been particularized by the employer and so to complete the contract.
>
> And that was, I think, the view of the appeal tribunal. In rejecting the term included by the industrial tribunal and preferring a different term they were, in my judgment, looking at the problem confronting them in that way and acting within their statutory powers and upon evidence which justified their preference. The industrial tribunal have stated that they would welcome authoritative guidance on 'problems over implied terms which are, on the authorities, of considerable difficulty in the modern employment context,' and in the hope of giving it I shall amplify that given by the appeal tribunal in the judgment of Slynn J and what I have already said about s 11 and its application to this case.
>
> The section enables the employee who has not received any statement, or a complete statement, of the terms of his employment to require the industrial tribunal to state them for him. When all the specified terms have been agreed, either expressly or by necessary implication, there is no problem for the industrial tribunal in stating any that have not been stated by the employer. But when one or more of the specified terms have not been agreed, even by necessary implication, the industrial tribunal may nevertheless have to state it for them.

In the case of *Innoprise Corp Sdn Bhd Sabah v Sukumaran Venugopal* [1993] 1 ILR 373, the claimant's case was based upon two contentions, namely that his contract of tenure had in fact been for five years and not three as alleged and secondly, that he was in fact a permanent employee of the company. The Industrial Court Kota Kinabalu held:

> Held:
>
> [1] There are numerous authorities which have enshrined the important tenet of Industrial Law that the employer's freedom to arbitrarily dictate terms of a contract at his absolute discretion is restricted by claims of social justice. The employers discretion cannot be exercised arbitrarily, capriciously or in a manner that will amount to victimisation of a workman or unfair labour practice.
>
> The workman's rights are to be determined on the basis of fair labour practice and on the basis of equity and good conscience to ensure that social justice is dispensed with and the principle of security of tenure is not undermined.

In the instant case, the applicant had in fact proven on a balance of probabilities that the normal retirement age was not 55 as claimed by the first respondent, but was at 60. Therefore, based on the earlier findings of fact of the second respondent and the evidence adduced before it, the first respondent had failed to prove, on a balance of probability:

A (i) that 55 was the normal retirement age of employees in the same category as the claimant; and

(ii) that in the alternative, the first respondent failed to disprove that the applicant's normal retirement age was 60.

B As such, the inevitable conclusion is that the applicant's termination by way of retirement upon attaining 55 was without just cause or excuse.

In respect of Industrial Court Award No 369 of 1998 the chairman of the second respondent held at p 4 (see p 237 of encl 3) as follows:

> C The court has held in Award No 369 of 1998 that the company may, in the absence of any contractual term in providing for a retirement age, stipulate a retirement age of 55 in its HRDPPG. It is open, however, to the claimant to show that notwithstanding the said stipulation, the company's regular practice is to retire staff in the category to which the claimant belonged at 60. However, on the evidence in the joint hearing the court was unable to find that the company has a normal retirement age of 60 for staff in the said category.

D And the second respondent held at p 34 in respect of Award No 368 of 1998 (see p 272 of encl 3) as follows:

> E Together with the earlier stated matters, the company's action at certain defining moments of the claimant's career, inter alia his promotion to managerial position and the extension of his service when he attained the age of 55 compels the court to view that the claimant had no reasonable basis for contending that he had the reasonable expectation to retire at the age of 60.

F It is pertinent to note that in arriving at its conclusion above the chairman of the second respondent had clearly relied on the reference to 55 as in the collective agreements and the HRDPPG as the retirement age coupled with the letters pertaining to the loan facility and the applicant's purported extension of service by the first respondent, respectively (see pp 141 and 142 of encl 3). However, prior to arriving at the said decision, the chairman in dealing with the applicant's evidences stated, inter alia, as follows in respect of Award No 368 of 1998 (see p 271 of encl 3):

> G The claimant has stated in a general way that he expected to retire at 60. He refers to 3 of his colleagues including one Tony Ho who retired at the age of 60. There is also the bald statement by Michael Chin that in his category of employees, almost nobody retires at 55. It is difficult thing for the court to find on such meager evidence that the company's normal retirement age for the category of staff to which the claimant belonged is 60. The incidence of three staff retirements at the age of 60 without any indication of its statistical H relevance does not advance the claimant's case very far. Had the evidence been that the claimant's retirement at 55 was out of the company's norm, the court might well be constrained to inquire into the question why the claimant did not have the benefit of an extension of his service beyond the age of 55 to 60.

I The first respondent must produce 'convincing evidence that the normal retirement age of employees in the applicant's category is 55'. The failure to prove this on a balance of probability, must inevitably result in the dismissal being without just cause or excuse. The burden of proving that the normal retirement age was 55 was on the first respondent, not on the applicant. It is thus clear that based on the findings of fact of the chairman of the second respondent at p 4 of the 369/1998 award, the second respondent had placed the burden on the applicant to prove that the first respondent's normal retirement age for the category of employees to which the claimant belonged to was 60 (see pp 237–271 of encl 3). In the instant case the applicant had no burden of proof but only an evidential burden. When a party has an evidential burden such a burden can be discharged by production of evidence which falls short of proof. Therefore as stated earlier, the evidential burden is an obligation to show that there is sufficient evidence to raise an issue as to the existence of non-existence of the facts in issue. In the light of the claimant's evidence as stated at p 32 of the 368/1998 award (see p 270 of encl 3), it was clear that the applicant had discharged this burden by raising an issue, by way of his evidence, that the normal retirement age of employees in his category was 60 and not 55 and this issue raised was in fact not rebutted by evidence of the first respondent. Therefore the impugned award suffers form infirmity on the ground of illegality. The second respondent should have firstly determined whether there was in fact convincing evidence that the normal retirement age of employees in the applicant's category was 55.

I am of the opinion that as there was no such evidence, the second respondent's conclusion that the applicant's retirement age was 55 was perverse.

I am of the opinion in the light of the fact that the second respondent had failed to take into consideration its earlier findings of fact, the impugned award was erroneous in its entirety. The purported reasons in which the second respondent had relied on was in fact in reality irrelevant and inapplicable to the applicants in the circumstances of this case. Thus in consequence, it is clear that the second respondent had failed to provide sufficient and adequate reasons in arriving at the decision that the dismissal was with just cause or excuse. It is apparent from a reading of the impugned award that the final conclusions of the chairman were arrived at without any consideration of his earlier findings nor did he carefully weigh the evidence before him. The award read as a whole is ambiguous. The second respondent had not only failed to base its decision 'upon materials which tend logically to show the likelihood' that the normal retirement age of employees in the applicants' category was 55, but in fact failed to make a finding of fact in relation to the normal retirement age of employees in the applicants' category, which was the crux of the matter in the present case. The second respondent had committed a jurisdictional error of law and as such the impugned award suffers from infirmity on the ground of 'illegality'. I therefore hereby order the issue of a writ of certiorari to quash both the awards of the second respondent.

The Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 stated as follows at p 757:

> In exercising judidical review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be

A unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916), and judgment of Lord B Diplock in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 at p 821; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100.

It is the ultimate decision of the second respondent when looked as a whole that matters. It is crystal clear that the second respondent's decision was C perverse, irrational, illegal as well as a nullity as the second respondent:

(i) totally acted on factors which it had decided as a fact, were inapplicable to the applicant;

(ii) failed to address its mind as to the sole issue at hand; and

(iii) the decision was not properly reasoned as the second respondent D failed to consider relevant matters, and took into consideration irrelevant matters in arriving at its decision that the applicants' dismissal was with just cause or excuse.

As to the remedy, it is now settled law that this court has the discretion to formulate the relief. Eusoff Chin CJ in the case of *R Rama Chandran* held E at p 147:

> (6) (Per Eusoff Chin Chief Justice) s 30(3) of the Act requires the Industrial Court to make its award without delay and where practicable within 30 days. Here, the employee had been without a job for seven years, and the object and spirit of the Act to have industrial disputes speedily resolved F in the national interests had been defeated and frustrated. The courts, therefore, should not be obliged to continue to arrive at decisions which are both unjust to the citizens and inimical to the public well-being simply because of something decided centuries ago (see p 184D, F).
>
> (7) (Per Eusoff Chin Chief Justice) Based on the facts on record, this was a fit and proper case where the jurisdiction of the court should not end with G the quashing of the award. The High Court jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of certiorari was developed and came to be granted by the courts in England. If the application for certiorari is dismissed, that ends the matter. But if the application is allowed, the court has surely to mould the order. If it were to merely grant certiorari to quash the award and nothing more, this would deprive the H writ of its vital and effective meaning and may result in grave injustice being caused to the employee (see p 184F–H).
>
> (8) (Per Eusoff Chin Chief Justice) As far as possible, the anxiety and endeavour of the court should be to remedy an injustice when it is brought to its attention. On the facts of the case before the court, to remit I this matter back to the Industrial Court would mean prolonging the dispute, which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demanded that to avoid further delay and expense, the court should determine the consequential relief

rather than remit the case to the Industrial Court for that purpose (see pp 184I–185A).

(9) (Per Eusoff Chin Chief Justice) In the context of the facts of the case before the court, it would not be in the interest of either the employer or the employee if the court were to order reinstatement with full backwages. The employee was now 51 years old, had been out of employment for seven years and had lost touch with his work. It was doubtful if he could fit in the society where he used to work and where he was not wanted. Under the circumstances, sending him back to the employer would cause him more mental distress and suffering. The appropriate remedy was to grant him compensation for loss of employment. A total sum of RM489,800 was to be paid by the employer to the employee (see p 185D–E, I).

In respect of Award No 368 of 1998 in the light of the fact that the applicant would be attaining the age of 60 on 23 March 2000, an order of certiorari with the following consequential orders are hereby issued to quash the Industrial Court Award No 368 of 1998:

(i) that he be paid compensation for loss of employment and arrears of salary from date of dismissal to 23 March 2000 with salary adjustments and arrears of salary adjustments and bonus in his category and other benefits;

(ii) that EPF contributions due on the arrears of wages be deducted and paid over to the EPF Board; and

(iii) all monetary payments due to the applicant be paid to him through his solicitors Messrs P Kuppusamy & Co, within one month from date of the decision; and

in respect of Award No 369 of 1998, in the light of the fact that the applicant would be attaining the age of 60 on 21 September 2000, an order of certiorari with the following consequential orders are hereby issued to quash the Industrial Court Award No 369 of 1998.

(iv) that he be paid compensation for loss of employment and arrears of salary from date of dismissal to 21 September 2000 with salary adjustments, and arrears of salary adjustments and bonus in his category and other benefits;

(v) that EPF contributions due on the arrears of wages be deducted and paid over to the EPF Board; and

(vi) all monetary payments due to the applicant be paid to him through his solicitors Messrs P Kuppusamy & Co within one month from the date of the decision.

Application allowed.

Reported by Jafisah Jaafar